Chinese legal system

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Overview

1. Brief Introduction to China
2. Chinese legal history and legal tradition
3. Modernization of Chinese Law
4. Post 1978 Legal Reforms
1. Brief Introduction to China

- Officially called as the People’s Republic of China or PRC (Chinese people, for thousands of years, call their country “zhongguo”, which literally means “Central Country” or “Middle Kingdom”, reflecting the fact or their belief that the country stood as a leading civilization for centuries, outpacing the rest of the world in the arts and sciences.)

- Largest country in terms of population (over 1300 million)

- Third the largest in the world in area (after the Ruria and Canada; slightly larger than U.S.A.)
Location and Climate

- Stretching from its southern borders in the Himalayas to the deserts of Mongolia in the north, and from the East China Sea through the Yangzi River Valley plains, to the Tibetan Plateau in the western mainland, China covers an area of some 9,600,000 square kilometres with more than 5,000 islands, of which Taiwan and Hainan are the largest.
- The climate varies from the subtropical south, with a heavy monsoon rainfall, to the arid North-west; in winter the temperature can be -30°C in the North-east, yet 15°C in the far South.
A Map of China
Diversity of People and Language

- Over 50 different nationalities living in China. The majority (94 percent) are Han Chinese; the other groups include Tibetans, Mongolians, Zhuang, Li and Miao whose languages and customs are quite different from those of the Han.
- The official language in China is Mandarin (Beijing dialect), as spoken in Beijing (the Capital), but there are also many different dialects to listen for.
China as a Third World Country

- Left behind by European civilizations in the 19th and early 20th centuries, during which it was beset by foreign invasions, military defeats, civil wars, and major famines.

- China sometimes sees itself as a Third World country, but outsiders sometimes find it puzzling that a Third World country can build its own rockets and nuclear weapons and have advanced research programs in many aspects of science.
About 70 percent of the people live in the countryside, and though many parts of rural China are still poor, the Chinese have, through their own efforts, managed to solve their food problem, achieved a remarkable level of health care, and provided at least primary education for the majority of children.

Since 1949, China's achievements have been an inspiration to many Third World countries.

2. Chinese legal history and legal tradition: the Confucian school and the legal school

*Li Versus Law*

- **Similarity:** both aimed at the maintenance of social order;
- **Difference:** what constituted an ideal social order and by what means such an order could be attained.
Li and Confucianists

- Denied that uniformity and equality were inherent in any society
- Emphasized that difference were in the very nature of things
- Believed that a fair social order could only be achieved through the harmonious operation of these differences
- Irrational to equalize what was unequal, resulting in destruction of rational division of labor and in overthrow of social order
- Human beings characterized by differences in intelligence and in virtues
- These differences set the stage for division of labor
- Two fundamental type of work recognized: the mental and the physical
- The latter to serve mental-labor class with the production and services
- Scholars and officials belonged to the mental-labor group, to study, acquire virtue, and to govern the people
Mental work highly valued
Line drawn between the superior and the inferior, leading to a relationship of subordination and superordination

“Great man have their proper business, and little men have their proper business…Some labor with their minds and some labor their strength. Those who labor with their minds govern others; those who labor with their strength are governed by others…This is a principle universally recognized.”

--By Mencius

“The younger serve the older; the inferior serve the noble; the degenerate serve the worthy. This is the pervading rule of the universe.”

--By Hsun Tzu
- Distinction between noble and humble, superior and inferior based upon talent and virtue of each member of the society.
- Further differences based on criteria of generation, age, degree of relationship, and sex.
- Status and modes of behavior in the larger society were determined by the fact of superiority and inferiority, in a family, by the degree of nearness and remoteness, superiority and inferiority, and seniority and juniority.
The function of $Li$

- Men’s statuses shall be clearly defined; their expected roles properly carried out
- $Li$: rules of behavior varying in accordance with one’s status defined in the various forms of social relationship; Formulated by the Confucianists
- The function of $Li$ is to achieve differentiation: when a person’s title and position are different, the $Li$ used are also different.
Confucianists believed that differentiation wld finally lead to a realization of their ideal society based upon the principle of “human relationship”—a society in which the ruler acts as a rule, the minister as a minister, the father, the son, the elder brother, the younger brother, the husband, the wife, etc.

San Gang Wu Chang (三纲五常: three principles & five constants)
1. Three principles
   A. Emperor is the principle of subjects;
   B. Father is the principle of son;
   C. Husband is the principle of wife

2. Five constants: 仁(Ren) kindness; 义(Yì) loyalty; 礼(Lì) courtesy & rites; 智(Zhì) wisdom; and 信(Xīn) trust. Regarded as in the human nature.
- *Li* considered by Confucian school as primary and fundamental in government
- A state will be in good order when *Li* are predominant and esteemed
Neither denied nor objected to the distinction between the noble, the humble, the superior, the inferior, the elder, the younger, the near and the remote.

But considered these matters as minor and irrelevant, and even a hindrance to the business of governing.

Interested in maintaining legal and political order.
Asserted that the governing of a state depended primary upon the rewards which encouraged good behavior and punishment which discouraged bad behavior.

Uniform law and uniform reward and punishment: determined by objective, absolute standards which permitted no differentiation on the basis of personal differences.
Not deny the reality of social differentiation, but refused to permit it to exert any influence over the law

All must be equal before law

Opposed to the tenet of the Confucianists that great officials are beyond punishment
Virtue v. Punishment

- *Li* implemented by moral education to improve human nature
- Education: most fundamental, thorough, and successful way to maintain social order
- ‘Law to punish the evil, not to encourage the good. People will try to avoid the punishment, but have no sense of shame’: all good behavior is derived from education instead of punishment
- Law inferior to education (ruling by virtue: The state of no litigation as the ultimate end)
Confucianization of law

- Most significant development in Chinese legal system prior to the 20th century modernization of Chinese law
- Law codes of the state of Wei, and of the Ch’in and Han were compiled by Legalists who won dominance and controlled the government
- With their triumph in the second century B.C., when Confucianism became the state philosophy, the Confucianists began to use their political influence to interpret and apply the law in accordance with Confucianist doctrines and most important of all, to revise the law by incorporating Li into it.
Confucianization as a gradual process: Began in Han dynasty and continued through Southern and Northern dynasties.

By the time of Sui and T’ang, the process of Confunianization was more or less completed, with T’ang Law representing the fullest development of

Confucian doctrines, especially the essential themes of Li, then came to dominate the law
No fundamental changes in Chinese legal system up to nineteenth century

Explanation to be found in the value system: close relationship between norms and values

*Li* were basic values long dominant in society, centuries before law was Confucianized

Confucian doctrines (values) dominated both law and society, hence stability in law and society
The Role of Law in Society

- To implement *Li*; Subordinated to *Li* and ethics; Punitive, and invoked whenever *Li* or moral principles were violated; Played a secondary role

- Emphasized on status; Specific as to familial or social status which was the main consideration in the administration of justice; Law characteristics shaped by particularism: Paid little attention to such matters as individual rights

- Litigation discouraged
3. Modernization of Chinese Law

- In the early 20th century, Chinese government began to revise and modernize its law.
- As a result of new influence from outside world.
- Codes similar to Western law formulated: Not traditional law thought to be inferior to Western law; but to urge Western powers to surrender their rights to extraterritoriality.
- Drafts of criminal and civil law compiled by Japanese legal advisors; Copied mainly from European and Japanese law (continental law system).
Criminal Code drafted in 1907 and promulgated by the government of the Republic of China:

- Contained hardly any clause dealing specifically with family status, social status, or the corresponding privileges.
- Put an end to the legal recognition of class differences;
- ‘Particularism’ gave way to ‘universalism’.
Civil Code drafted by a Japanese jurist in 1911:

- Included only three sections: general principles, law of debts, law of things;
- Sections of family and successions drafted by two Chinese lawyers not presented to the emperor for approval;
- So, not become a controversial issue
Six Laws of the Republic of China

- Civil Law (1929)
- Civil Procedure Law (1935)
- Criminal Law (1935)
- Criminal Procedure Law (1935)
- Constitution (1946)
- Administrative Laws
Abolition in 1949 by P.R.C of all the laws of the predecessor state, the Republic of China.

Left a substantial legal vacuum.

Little need for a formal legal system in many areas of national life, since the economy was largely subject to state planning and conflicts could thus be resolved without reference to legal rights and duties.

Recurring political turmoil prevented any substantial development of the legal system for the first three decades of the PRC.
4. Post 1978 Legal Reforms
Post 1978 reforms: law based governance

- If there is no law then on what basis does the state exercise power, punish offences, regulate civil affairs?
- Legal reform according to Deng Xiaoping in 1978
  - To institutionalise the people’s democracy
  - Pass laws: sooner more, trials in localities
  - Strengthen legal institutions: procuratorate and courts
    - There must be laws to go by,
    - Laws must be observed,
    - Laws must be strictly enforced,
    - Violators must be brought to book
  - Party must be governed by rules, discipline
    - Discipline Inspection Committee
Role of law in modernisation

- To underpin the success of economic reform and modernisation
- Law as a way to legitimate the exercise of state power/ Party leadership
- Rule by law to rule of law- law as a mode of governance, constraining state power, protecting individual rights?
- Changes to Party control over law, legal institutions and law enforcement
Governance and Administration

- Law as a mechanism to separate state and Party
- Relationship of law to state power - constrain, underpin, how much discretion?
- State and people - different conceptions of the relationship between the state and the people
- Different theories of the purpose of law
As a means to Govern Society and regulate administration (soviet model)

- Guanli lun 管理论
- efficiency and stability
- "institutionalise governance of society and state administration within the bounds of a set of legal rules so that the state can effectively control and manage the society’s politic, economic, and cultural life and its administrative organs and their officers"
- CrL&CrPL in 1979; Constitution in 1982.
Protect individual rights (common law model) 控权论

- assumes that the rights and interests of the individual needs protection against infringement or abuse by the state
- increase reciprocity between citizen and state
- related concepts: separation of powers, court fetters administrative power, rules limit administrative discretion, arbitrary power, rule of law
- Administrative Penalty Law (1996)
- Administrative Litigation Law (1990)
- Administrative Review Law (1999)
- Criminal Procedure Law (1979, revised in 1996)
- Criminal Law revised in 1997
Administrative License Law (2003)

- General provisions:
  - to regulate the establishment and implementation of administrative licenses;
  - to protect the legitimate rights and interests of citizens, legal persons and other organizations;
  - to safeguard public interests and social order
Establishment of an Administrative License

--Scope of matters involving licenses

--Authorities empowered to establish

Authorities to grant;

Procedures of applying and granting (or refusing) a license;

Fees limited
Administrative Review (or Reconsideration) Law (1999)

- Administrative remedies
- Review by administrative agency at the next higher level
- Expeditious way to protect private rights
- Neutrality and independence not essential
Administrative Litigation Law (1989)

- To protect the lawful rights and interests of citizens, legal persons and other organizations;
- To supervise the exercise of administrative powers and ensure administrative agencies exercise their power in accordance with the law.
- Burden of defendant to prove the facts and legal basis for its administrative decision (concrete administrative act: penalty or rejection of a license application, etc.
- Usually, not have to exhaust admin. remedies
Features of Criminal Justice

- All crimes and punishments shall be prescribed expressly by law (罪行法定);
- Non-retrospective (法不溯及既往), unless the new law is in favor of the defendant;
- Right to counsel;
- Proportionality of offence and punishment;
Balance theory

- Pingheng lun 平衡论
- theory of balance is well reflected in the Administrative Penalty Law (1996): Balancing need for protection of private rights and need for administrative efficiency
- Control is necessary to achieve balance
Consider

- Under these different models:
  - Would the nature and purpose of rule-making differ?
  - What are the objectives for regulation and supervision of the decision-making of authorities and their officers?
## Legal system of P.R.C: Six Laws Again!

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<tr>
<th>Substantive</th>
<th>Procedural</th>
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Some Notes Taken of the Constitution’s 4 amendments

- AMENDMENT ONE (1988)
- AMENDMENT TWO (1993)
- AMENDMENT THREE (1999)
- AMENDMENT FOURTH (2004)
AMENDMENT ONE (1988)
- Private economy permitted: Exploitation is back
- Lease-hold transfer permitted

AMENDMENT TWO (1993)
- More realistic attitude to national development
- C.C.P’s leadership prolonged
- Market economy to be established
AMENDMENT THREE (1999)

- Primary stage of socialism prolonged
- Rule according to law: Thin rule of law?
- Diverse sectors of the economy & Variety of modes of distribution."
- Non-public economies further recognized
AMENDMENT FOURTH (2004)

- compensation for the land and other private property expropriated or requisitioned."

- Non-public economy encouraged and supported

- Private property is inviolable

- a sound social security system to be established

- Human Rights!
A gradual process of liberalizing national economy: towards a market economy;
More attention paid to the protection of private rights;
Constraints on the exercise of state power by authorities and officers;
Strengthen the legitimacy of C.C.P regime.
Due to WTO accession, the Chinese legal system entered a new stage of radical changes.